

**EXPLANATORY MEMORANDUM TO  
THE OVERSEAS COMPANIES REGULATIONS 2009**

**2009 No.**

1. This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform (BERR) and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 Every company incorporated in a country outside the United Kingdom (an overseas company) that operates its business in the United Kingdom through at least one establishment (that is to say either a branch or a place of business that is not a branch) and is not a UK-incorporated subsidiary company, must register its particulars with the Registrar of Companies. The Overseas Companies Regulations 2009, made under the Companies Act 2006 (“the 2006 Act”), set out the UK company law filing requirements for this type of company, which come into effect on 1 October 2009.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4. Legislative Context**

4.1 The 2006 Act has substantially rewritten company law. It replaces almost all of the provisions of the Companies Act 1985 (“the 1985 Act”) and also introduces new provisions. Part 34 of the 2006 Act (sections 1044 to 1059) deals with various matters relating to overseas companies that are carrying out business in the UK. Other sections of the 2006 Act also apply to overseas companies. These Regulations primarily relate to the exercise of powers in Part 34, but also contain provisions made under other sections of the 2006 Act.

4.2 These Regulations are intended to replace requirements in Part 23 and Schedules 21A – D of the 1985 Act and the corresponding provisions in the Companies (Northern Ireland) Order 1986<sup>1</sup>. The Regulations bring the previously dual regimes relating to overseas companies with a ‘branch’ or a ‘place of business’ together into one single regime for a ‘UK establishment’.

4.3 These Regulations are prepared in line with Directive 89/666/EC of the European Parliament and of the Council (11<sup>th</sup> EU Directive) and the Bank Branches Directive (Directive 89/117/EEC), which was implemented previously through amendment of the 1985 Act by the Overseas Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992<sup>2</sup>. The implementing provisions of the 1985 Act are re-enacted in these Regulations.

**5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

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<sup>1</sup> S.I. 1986/1032 (N.I. 6)

<sup>2</sup> S.I. 1992/3179

## 6. European Convention on Human Rights

6.1 Ian Pearson, Economic and Business Minister, has made the following statement regarding Human Rights:

In my view the provisions of the Overseas Companies Regulations 2009 are compatible with the Convention rights.

## 7. Policy background

- *Terminology*

7.1 The 1985 Act refers to ‘oversea companies’. The 2006 Act changes this terminology from ‘oversea’ to ‘overseas’. For ease of reference, from this point forward this Explanatory Memorandum consistently uses the term ‘overseas’ even when referring historically to ‘oversea’ companies.

- *What is being done and why*

7.2 There are currently just over 9,100 overseas companies that have registered with the Registrar at Companies House. An average 630 new British places of business or branches of overseas companies are registered per year. At present there are two separate filing regimes for these different types of establishment. The new policy as set out in these Regulations is to merge these two regimes into a single regime for all overseas companies that carry on business in the United Kingdom.

7.3 The overseas companies regime in the 1985 Act applies to companies with either a ‘place of business’ or a ‘branch’ in Great Britain. A similar regime operates in Northern Ireland, as set out in Part 23 of the Companies (Northern Ireland) Order 1986. These new Regulations apply to overseas companies with an establishment anywhere in the United Kingdom and from 1 October 2009 all overseas companies registered in Northern Ireland will transfer to the UK-wide regime. Currently Northern Ireland companies that carry on business in Great Britain must register at Companies House as an overseas company but these registrations will cease from 1 October 2009.

7.4 The Government has decided that the 1985 Act overseas companies regime is overly complex. Under this regime overseas companies have to decide on registration how to define their presence in Great Britain. This, in turn, determines the level of detail on the overseas company to be provided to the Registrar, including whether or not to file a set of accounts on registration. The ‘branch’ regime implements the 11<sup>th</sup> EU Directive. This term is not defined in the Directive. The new policy of simplification, reflected in the Regulations, is to provide for a single regime based on the umbrella concept of ‘UK establishment’.

7.5 Some of the individual provisions in the 1985 Act regime are also complex and can prove difficult to understand. The new Regulations are kept as simple and straightforward as possible and set out the majority of provisions that overseas companies need to adhere to in one place. They also set out in detail, provisions that were previously described through cross-references in the 1985 Act.

7.6 The Company Law Review was particularly critical of the 1985 Act accounts provisions. In the case of companies that fall within the EU 11<sup>th</sup> Directive the position

is clear. However for ‘places of business’ and companies incorporated in non-EEA countries, accounts must be filed as set out in section 700 of the 1985 Act (“section 700 accounts”), which the Company Law Review describes as rendering it “difficult to work out the form and content of the accounts required”. The new Regulations address this by basing accounting provisions primarily on what is currently required of an overseas company by its home state, whether EU or non-EU, and otherwise by providing more transparent accounting provisions based on Companies Act 2006 requirements. The Regulations also explicitly require greater transparency from the overseas company in terms of the accounting and audit standards that it has or has not applied in preparation of the accounts, the aim being to help the UK investors better understand the information that they are dealing with.

7.7 The Regulations also apply to overseas companies new aspects of UK company law introduced through the 2006 Act, treating the UK establishments in the same way as UK companies, as far as allowed by the 11<sup>th</sup> EU Directive and the provisions of Part 34 of the 2006 Act. This includes trading disclosures provisions whereby the name of the UK establishment must be prominently displayed, as well as extending the protection of the details of residential addresses accorded to the directors of UK companies.

7.8 The disclosure requirements in the Regulations remain based on those in the 1985 Act regime for overseas companies with a ‘branch’ in Great Britain. Requirements on ‘branches’ are governed by the EU 11<sup>th</sup> Company Law Directive, which is a maximum harmonisation directive and these have been applied accordingly. Similar requirements are applied in the Regulations to ‘places of business’ under the single term ‘UK establishment’.

## **8. Consultation outcome**

8.1 The Government consulted on the change to the overseas companies regime three times. An early proposal for a move to a single regime was set out in the White Paper “Company Law Reform” (CLR), published for full public consultation on 17 March 2005 (Cm 6456). As the 11<sup>th</sup> EU Directive is a maximum harmonisation directive, it was proposed that the more onerous requirements on ‘branches’ would be applied to overseas companies with either ‘branches’ or ‘places of business’ in the UK. Business supported a move to a single regime.

8.2 Chapter 2 (Section K) of the “Implementation of Companies Act 2006 Consultative Document”, published on 28 February 2007 (URN 07/666), continued to support a single regime for overseas companies that do business in the UK, but tested this on the basis of only applying to overseas companies with UK ‘branches’. There were some concerns at that time as to whether imposing similar requirements as those set out for ‘branches’ on overseas companies with UK ‘places of business’ might fall foul of Community Law. These concerns were therefore exposed in the consultation document.

8.3 The majority of respondents to this consultation agreed (as in the response to the CLR) that it would be preferable to move to a single regulatory regime for overseas companies. Most accepted a regime based on the concept of ‘branch’, but considered that the concerns regarding Community Law were unwarranted. In addition, some respondents expressed concern that they would be disadvantaged by the lack of any registered information at Companies House on overseas companies with a ‘place of business’ in the UK.

8.4 Taking into account the needs of agencies that regularly access information on the register, the Government decided that although the general principle of harmonisation means that we should not impose disclosure obligations that go beyond the 11<sup>th</sup> Directive, the Directive itself does not prevent the UK from prescribing similar disclosure requirements in respect of places of business. The disclosure requirements are non-discriminatory, not onerous and are adopted for the purpose of third party protection. It was decided that it would satisfy the needs of most stakeholders to establish a single regime based on the wider concept of 'place of business' to include the 'branches' within the meaning of the 11th Company Law Directive on branch disclosures, as originally set out in the CLR.

8.5 The Government prepared the first draft of these Regulations (URN 07/1704) on this basis and published them for consultation with its response to the February 2007 consultation (URN 07/1704GR) in December 2007. Most respondents focussed on specific technical points of drafting and otherwise the vast majority considered that the draft Regulations successfully simplify registration and reporting requirements for overseas companies, reducing their existing administrative burden, and welcomed the approach taken. A near-final draft of the Regulations (URN 08/1069) was published with the Government response to the December 2007 consultation (URN 08/1066) in July 2008.

8.6 Given the substantial changes that were made to the accounting provisions, the Government specifically consulted accountants from PwC, Deloitte and Touche and Ernst & Young on the new approach prior throughout the period of public consultation, as well as taking general comments from the Institute of Chartered Accountants in England and Wales (ICAEW).

8.7 The draft Regulations were also drawn up following close consultation with Companies House and colleagues in the Department of Enterprise, Trade and Investment in Northern Ireland. The repeal of Part 23 of the Companies (Northern Ireland) Order 1986 and the move of overseas companies with a 'branch' or 'place of business' in Northern Ireland to the new UK regime has been reflected in the transitional provisions. Changes to Companies House systems have also been reflected in the Regulations, for example, from 1 October 2009 they will hold a single UK wide database for all UK establishments and the Government therefore removed the requirement in Regulations for overseas companies to stipulate where their establishment is registered. This allows overseas companies to benefit from provisions which avoid duplicate delivery of documents.

8.8 Having settled the question of which regime to apply to overseas companies, and the main points of drafting, there were no further rounds of consultation. However the final draft of the Regulations, including draft transitional provisions, was shared with key stakeholders, including the Law Society and others on the Companies Act implementation Steering Group, as well as the accountants who had previously commented.

8.9 In February 2009, the Government decided to separate out the provisions for execution of contracts and the registration of charges related to overseas companies with a UK establishment from the main Overseas Companies Regulations. In practice these particular provisions do not relate to returns registered by overseas companies or their UK establishments, but to those doing business with such companies. Additional time was also needed for further consideration to finalise the Regulations for the registration of overseas companies' charges.

8.10 Rather than delay making these Overseas Companies Regulations, which are subject to affirmative procedure, the Government decided that it would be overall preferable to have separate Regulations for the registration of overseas companies' charges and execution of documents. These separate Regulations will be subject to negative resolution procedure in accordance with section 1052 of the 2006 Act and will be made soon after the main Overseas Companies Regulations.

8.11 Most of the comments received during the various rounds of consultation were supportive with largely minor technical points of drafting. Some of the more substantive points raised, which the Government did not consider appropriate for amendment, covered, for example, whether penalties for non-compliance with various provisions in the Regulations should be a standard penalty for overseas companies. The Government did not agree on this point because its approach had been to ensure that penalties are consistent with those for UK companies, as defined in the Companies Act 2006, where in some cases these have been specifically prescribed, e.g. with regard to trading disclosures. This is also consistent with the approach currently taken under the Companies Act 1985 regime for overseas companies.

8.12 The views of those who responded to consultation on the Overseas Companies Regulations were considered carefully and were particularly helpful with regard to the accounting provisions. The Government was persuaded, for example, to apply some 2006 Act exemptions from the requirement to prepare group accounts to overseas companies.

## **9. Guidance**

9.1 Non-statutory guidance on these Regulations will be prepared prior to the commencement of the Regulations on 1 October 2009. The guidance will primarily be aimed at overseas companies and their representatives in the UK. Companies House also intends to contact all registered overseas companies with information on the regime change during the summer of 2009.

## **10. Impact**

10.1 The new Regulations change the content of the regime for overseas companies that carry on business in the United Kingdom through a 'place of business' and align it with the requirements of the 2006 Act. They simplify the initial registration requirements for overseas companies and relieve these companies of the need to choose how to initially register their presence in the UK, thus reducing their need for legal advice. This should ensure that more overseas companies comply with this aspect of UK company law, providing better information to UK investors.

10.2 There is a small burden for some existing overseas companies who may have to provide additional information to Companies House as part of the transition from the 1985 Act regime to the 2006 Act regime, but overseas companies will already have the information to hand at minimal cost. The Government has minimised the potential greater burden of supplying a set of accounting documents as part of transition to match the new registration requirements by requiring these to be supplied within a year of commencement, allowing existing companies to file their next due set of annual accounts to satisfy this requirement.

10.3 There may be some further familiarisation costs for some companies associated with learning about new legal requirements or deregulatory measures that feed through to the new regime but these should be reduced by the simpler approach adopted in the

new regime. The Government will seek to minimise the impact of these costs by providing guidance to assist companies in the introduction of the new regime, as set out above in paragraph 9.

10.4 There is no impact on overseas charities or voluntary bodies unless these operate as overseas companies and are incorporated under the relevant parent law of the country where the company is based and have previously registered a UK ‘place of business’ or ‘branch’ at Companies House, or will register a UK establishment in the future, in which case the impact is as described above.

10.5 The impact on the public sector is low. Enforcement agencies, primarily Companies House, the Insolvency Service and agencies such as the Serious Fraud Office will need to be aware of the changes.

10.6 An Impact Assessment providing further detail is attached to this memorandum.

## **11. Regulating small business**

11.1 The legislation applies to small businesses that are incorporated as overseas companies under the relevant parent law of their country of incorporation, and which run part of their business in the UK.

11.2 To minimise the impact of the requirements on companies employing up to 20 people, the approach taken is to apply similar provisions (including accounting provisions) as for UK small businesses, as far as allowed by the 11<sup>th</sup> EU Directive. The accounting provisions require overseas companies to provide accounting documents as governed by their parent law. If the overseas company is incorporated in an EEA State and their parent law applies exemptions to small businesses then these will carry through these Regulations. The Regulations have no direct impact on UK small businesses.

11.3 The basis for the final decision on what action to take to assist small business was in line with the Government’s ‘think small first’ approach to company law reform and in keeping with the 11<sup>th</sup> EU Directive.

## **12. Monitoring & review**

12.1 The success of these Regulations will be subject to internal review after 5 years using data readily available from Companies House as to any change in registration numbers of overseas companies and any reports of difficulty experienced in the application of the new regime. We will be interested, for example, in any improvement in the quality of accounts filed by overseas companies, which can be compared against those sampled by BERR during the preparation of the Regulations. Otherwise the overseas companies regime will be reviewed and amended as necessary in light of subsequent changes to UK or EU company law.

## **13. Contact**

13.1 Kathryn Waller at the Department for Business, Enterprise and Regulatory Reform Tel: 0207 215 6873 or email: [kathryn.waller@berr.gsi.gov.uk](mailto:kathryn.waller@berr.gsi.gov.uk) can answer any queries regarding the instrument.

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>Business, Enterprise and Regulatory Reform</b>	<b>Title:</b> <b>Impact Assessment of the draft Overseas Companies Regulations 2008</b>	
<b>Stage:</b> Final	<b>Version:</b> 2	<b>Date:</b> 1 May 2009
<b>Related Publications:</b> The Overseas Companies Regulations 2009; Implementation of Companies Act 2006 Consultative Document February 2007		

**Available to view or download at:**

<http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006> [www.berr.gov.uk/consultations](http://www.berr.gov.uk/consultations)

**Contact for enquiries:** [kathryn.waller@berr.gsi.gov.uk](mailto:kathryn.waller@berr.gsi.gov.uk)

**Telephone:** 0207 215 6873

What is the problem under consideration? Why is government intervention necessary?

How to define the regulatory regime for overseas companies, as regards both registration of certain details about the company and its UK establishment (including company accounts) with the Registrar.

Without Government intervention, overseas companies might prevent those who deal with them in the UK via their establishment from accessing accurate information, and might have placed upon them an unacceptable admin burden.

What are the policy objectives and the intended effects?

The objective is that overseas companies are clear about their registration and filing requirements in the UK and are easily able to provide the information required of them. Also that everyone can know an overseas company's identity when it has a UK establishment and can easily find information about it on the public record.

What policy options have been considered? Please justify any preferred option.

For company registration requirements, a single regulatory regime based on the wider concept of 'UK establishment' (using the EU 'branch' concept as a framework) - preferred option to allow widest possible scope for registration (see paras 40 - 44 of background).

For accounts provisions, a regime based on Part 15 of the Companies Act 2006 and IAS.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? 2014 (based on 1 Oct 2009 commencement date)

**Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister:

Ian Pearson

.....Date: 7th May 2009

## Summary: Analysis & Evidence

**Policy Option: 3**

**Description: Company registration based on concept of 'UK establishment' with requirement to register charges applying to registered companies only**

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' Based on new 'places of business' now having to file certified translated accounts on registration (based on an average of new registrations).
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£ 0		
	<b>Average Annual Cost</b> (excluding one-off)		
	£ 32k - 313k		<b>Total Cost (PV)</b> <b>£ 0.28m - 2.69m</b>
Other <b>key non-monetised costs</b> by 'main affected groups' None			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Non-EU 'branches' & all 'places of business' now without burden to prepare & submit section 700 accounts. Assessed benefit on basis of non-EU 'branches' and all 'places of business' not preparing special set of accounts and instead simply delivering overseas company accounts.
	<b>One-off</b>	<b>Yrs</b>	
	£ 0		
	<b>Average Annual Benefit</b> (excluding one-off)		
	£ 5.21m		<b>Total Benefit (PV)</b> <b>£ 44.84m</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Key benefit (in contrast to other options) - choice of 'place of business' / 'branch' becomes immaterial - both treated as same under one regime 'UK Establishment'. No time/effort involved in assessment (little to no importance). Benefit is difficult to assess (monetarily) but major customer benefit (ease of use).			

Key Assumptions/Sensitivities/Risks Legal advice is, while we cannot go beyond the 11th Company Law Directive requirements for 'branch', we can justify potential interference with the freedom of establishment (imposing additional requirements on 'places of business') as they are proportionate, meet a legitimate aim and do the minimum necessary to meet that aim.

Price Base Year 2005	Time Period Years 10	<b>Net Benefit Range (NPV)</b> <b>£ 42.15 - 44.56m</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 43.36m</b>
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What is the geographic coverage of the policy/option?		UK	
On what date will the policy be implemented?		01/10/2009	
Which organisation(s) will enforce the policy?		Companies House	
What is the total annual cost of enforcement for these organisations?		£ N/A	
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		No	
What is the value of the proposed offsetting measure per year?		£ N/A	
What is the value of changes in greenhouse gas emissions?		£ N/A	
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium    Large
Are any of these organisations exempt?	No	No	N/A    N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)	
Increase of    £ 313k	Decrease    £ 5.21m	<b>Net Impact</b>	<b>£ 4.9m</b>

Key:    **Annual costs and benefits: Cons**

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### **BACKGROUND**

#### **Registration of overseas companies at Companies House**

1. Currently, whether an overseas company has a 'branch' or other 'place of business' in the UK, it is required to make public disclosures to the Registrar. These requirements are similar, but not identical.
2. The duty to register particulars of a 'place of business' was introduced in 1908 companies legislation and has applied ever since. This concept has never been defined in UK legislation. The concept of 'branch' is an EU construct with registration requirements set out in the 11th Company Law Directive, which we implemented in the UK by section 690A of and Schedule 21A to the 1985 Companies Act (in force since 1 January 1993).
3. The 11th Directive does not contain a definition of 'branch' and no attempt was made to go beyond Community Law and provide one in the implementing legislation, and a decision was taken at that point to create two parallel regimes, which exist to this day in Part 23 of the 1985 Companies Act.

#### **Burden of current disclosure requirements**

4. The main disclosure burden for overseas companies that open a 'branch' or other 'place of business' in the UK is having to choose which regime they fall under and therefore how to register (for the reasons outlined above).
5. Currently the filing requirements for 'places of business' are slightly less onerous than for 'branches', with the exception of filing accounts when the reverse can be true as the requirements are looser and can be more complicated to interpret. We have found instances of 'places of business' filing more data than required – imposing an additional administrative burden on such companies – and others where a more transparent account could have been provided and could have been more useful to UK creditors.

#### **Options for future disclosure requirements**

6. In implementing the 2006 Act it has been our view that current arrangements involving parallel regimes can be confusing and are no longer sustainable, particularly as it can be difficult for overseas companies to decide which regime they fall under, given lack of clear definitions. This view was shared by the Company Law Review. The Government has therefore tested the possibility of a single regime through the Company Law Review and more recently in the February 2007 Companies Act implementation consultation document.

## **Option 1 – Maintain the status quo**

7. Although maintaining the status quo exists as an option, it has essentially already been ruled out.

8. By continuing to operate to the same dual regime of 'place of business' and 'branch' we would of course not place any additional burden on overseas companies, other than that which already exists. However there is a continued burden, as identified in the Company Law Review, in terms of companies having to identify which regime they are subject to. The lack of a full definition of a 'branch' in the 11th Directive is unlikely to change and will continue to present an admin burden as long as we operate a dual regime. It is difficult to assess this burden in monetary terms, as no differentiation is made in the standardised PwC figures between 'branches' and 'places of business' and also there is no assessment by PwC of the overall burden of an overseas company having to assess which regime to apply.

## **Option 2 – Company registration based solely on the EU concept of 'branch'**

9. The CLR advocated a single regime, which was very popular with business. It recommended it apply to all overseas companies who establish a 'place of business' (which would include a 'branch') in the UK.

10. The CLR could not recommend reducing the disclosure requirements to those applying only to a company with a 'place of business' under UK law, because of the existence of the more onerous requirements on 'branches' in the EU 11th Company Law Directive. The 11th Directive is a maximum harmonisation directive meaning that Member States cannot impose requirements on 'branches' beyond those specified in the Directive. It therefore recommended applying to 'place of business' companies the 11th Directive requirements.

11. At the time of the February 2007 consultation document, we were doubtful, from a legal perspective, that we could impose similar requirements to those set out for 'branches' in the 11th Directive on 'places of business' (or any other form of establishment of an overseas company). The view at the time was that to do so might be an unjustifiable breach of the EU Treaty right of freedom of establishment. This is why the February consultation document advocated a single regime applying only to overseas companies that opened a UK 'branch'.

### **Benefit**

12. Pursuing a single regime on the basis of the EU concept of 'branch' would have meant that only overseas companies self-defined as a 'branch' according to the 11th Directive would register details with the Registrar and the same regime would apply to all those companies. The UK Government would be certain that it had not gone beyond the requirements of the 11th Directive for 'branches' of overseas companies, as set out in the February 2007 consultation document, and there would no longer be any admin burden for overseas companies with a 'place of business' in the UK (save for having to ascertain that it is not a 'branch' – see below).

### **Costs**

13. In creating a regime that only applies the concept of 'branch', the UK Government would not resolve the confusion for overseas companies in terms of the lack of definition of either a

'branch' or a 'place of business'. An overseas company would still have to determine its identity in order to decide whether to register its presence in the UK.

14. The regime choice admin burden would exist for both existing and new overseas companies. While there may be those who wish to view this as a way to avoid regulation, others may be exercised by the possibility of not defining their UK business correctly and perhaps operating outside the law and seek legal advice, which could be costly.

15. More significantly in our view would be the loss of information on overseas companies with a 'place of business' in the UK that until now has been publicly available, and therefore potential undermining of creditor protection. Enforcement agencies would no longer have access to these details which they argue would hamper investigations. There would also be the (financially unassessed) added complication of moving from one regime to another for those companies that decided to redefine their UK business, although this would mostly be a cost borne by Companies House and not by business.

### **Support for Option 2**

16. Most respondents to the February 2007 consultation document accepted the reasoning (set out in the consultation document) for a regime based on the concept of 'branch', although it was questioned whether the Community law risks set out in the consultation document were sufficient to warrant the proposed approach.

### **Option 3 - A single regime for all UK establishments of overseas companies, covering both 'place of business' and 'branch' (based on EU 11th Company Law Directive requirements for a 'branch')**

17. This option is essentially the 'place of business' single regime originally advocated in the CLR, which was very popular. Under this regime, the need for an overseas company to define its presence in the UK as a 'place of business' or 'branch' becomes immaterial as the same regime would apply to any definition of a UK establishment of an overseas company.

18. The requirements of this regime can only be based on the requirements of the 11th Company Law Directive for a 'branch' as this is a maximum harmonisation directive. In turn this means that there is no change in the admin burden for any overseas company with a 'branch' currently registered in the UK.

### **Benefits**

19. The obvious benefit is that the regime choice burden disappears altogether. An overseas company can still define their presence in the UK as either a 'branch' or a 'place of business', but we will consider either to be a UK establishment and treat both the same in terms of registration and filing requirements. The details of all these companies will be available, through Companies House, to creditors and enforcement agencies. The monetised benefit presented in the summary on page 2 of this impact assessment is based on savings attributed to the preparation and filing of accounts – as set out below in paragraphs 36 and 37. The figures presented have reduced from the December 2007 draft assessment as overseas company charges are now dealt with in a separate Statutory Instrument and therefore the costs and benefits associated with changes to company charges have been removed from this assessment.

## Cost

20. There would be a slight increased admin burden for any overseas company registering a 'place of business' in the UK as the new regime would be slightly more onerous for them in comparison with the present system because this would now be subject to the slightly more onerous 11th Directive 'branch' requirements. For the most part the admin burden is negligible i.e. providing a few extra short details about the company on registration, which are well known to the company such as the business name – we have therefore predominantly accounted here for the extra burden in terms of providing certified translated accounts on registration. The burden assessment is summarised in the table below (Table 1). For a small company we estimate this to cost in the region of £200. This could rise to £1250 for a larger company (based on PwC figures).

21. The monetised cost set out in the summary on page 2 is based on this range of costs (£200 - £1250) and an estimated range of potential new registrations of overseas companies with a UK 'place of business' within a year (160 – 250). The lower end of this registrations scale is based on the annual average of new registrations in December 2007 when the first draft of this Impact Assessment was published (based on an average of the previous 5 years data at that point). The upper end of the scale is reflects an average from a different set of Companies House data going back over a longer period. The current average, based on figures over the past five years, is 214, which suggests the range is appropriate. The cost is therefore estimated at £32k to £313k.

22. Responses to the CLR favoured a single regime on the basis of the wider 'place of business' concept, even allowing for the increased admin burden.

### Table 1 - Current registration disclosure requirements for overseas companies

23. The proposed regime would require current and new 'places of business' to adopt all the registration requirements currently listed here for 'branch'. The column entitled 'branch' sets out the 11th Directive disclosure requirements of a 'branch', which would not change. The column entitled 'place of business' sets out what they are currently required to disclose on registration and any additional requirements that would result from a move to a single regime. The third column assesses the extra cost in each case for a 'place of business' – for the most part this is nil or negligible. We have focussed on registration requirements here, as this is where there would be the greatest change in cost. Overseas companies are also required to file particulars with respect to accounts, winding up/insolvency, trading disclosures – as set out in the Overseas Companies Regulations 2009, and with respect to charges and contracts – as set out in the draft Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009.

<b>BRANCH</b>	<b>PLACE OF BUSINESS</b>	<b>ASSESSED EXTRA COST</b>
Company / Corporate name	Currently disclose	NIL
Alternate company name	In limited circumstances	NEGLIGIBLE
Country of Incorporation	Currently disclose	NIL
Identity of register (if applicable)	Additional requirement	NEGLIGIBLE
Legal form	Additional requirement	NEGLIGIBLE

<p>[Only required from branches of companies incorporated in <b>non-EU Member States</b> OR if a company's constitutional documents do not cover this information:]</p> <ul style="list-style-type: none"> <li>• Address of principle place of business in the home country</li> <li>• Objects of company</li> <li>• Issued share capital</li> </ul>	<p>Additional requirement (all)</p>	<p>NEGLIGIBLE</p>
<p><b>Company secretary details</b>  (a) name  (b) previous name  (c) address</p>	<p>Currently disclose (all)</p>	<p>NIL</p>
<p><b>Company directors</b>  (a) name  (b) previous name  (c) address  (d) date of birth  (e) nationality  (f) occupation  (g) other directorships  (h) country or state of usual residence</p> <p>Extent of authority to represent the company</p> <p>Whether director can exercise powers alone</p>	<p>Currently disclose  Currently disclose  Currently disclose  Currently disclose  Currently disclose  Currently disclose  In limited circumstances  Additional requirement</p> <p>Additional requirement</p> <p>Additional requirement</p>	<p>NIL / NEGLIGIBLE</p>
<p><b>Constitution etc</b>  (a) copy  (b) certified translation  (c) copy of latest accounts  (d) certified translation</p> <p>[Only required from branches of companies incorporated in <b>non-EU Member States</b>:]</p> <ul style="list-style-type: none"> <li>• The law under which the company was incorporated</li> <li>• The period for which it is required to prepare accounts</li> </ul>	<p>Currently disclose  Currently disclose  Additional requirement  Additional requirement</p> <p>Additional requirement</p> <p>Additional requirement</p>	<p>NIL  NIL  NEGLIGIBLE  £200 – 1250</p> <p>NEGLIGIBLE</p> <p>NEGLIGIBLE</p>
<p><b>Branch details</b>  (a) Persons authorised to represent the company as permanent representatives  (b) whether those persons are authorised to accept service  (c) extent of authority to represent the company  (d) whether powers can be exercised alone  (e) address  (f) date branch opened</p>	<p>Additional requirement</p> <p>Additional requirement</p> <p>Additional requirement</p> <p>Additional requirement</p> <p>Currently disclose  Currently disclose</p>	<p>NIL / NEGLIGIBLE</p>

(g) business carried on (h) name of branch, if different from name of the company	Additional requirement Additional requirement	
Places of business do not currently provide details of permanent representatives but do provide details of anyone authorised to accept service of documents.		

### **Companies House statistics on overseas companies**

24. Statistics from Companies House setting out the number of companies involved are set out below. Currently just over 64% of companies incorporated overseas already define their presence in the UK as 'branches'. In the past five years, the rate of registration of new 'places of business' compared to 'branches' has been between 25-30% of all overseas establishments. These numbers are not insignificant, but the case remains that the burden required of them is outweighed by the advantage of the simpler regime and the benefit of overseas companies avoiding having to choose how to categorise their UK business.

25. Data supplied by Companies House shows that in the last five years:

- **2,340** overseas companies with a **branch** registered with Companies House
- **814** overseas companies **without a branch (therefore with a place of business)** registered with Companies House

By end-March 2009 there were registered with Companies House:

- 9,178 total overseas companies (live)
- **5,901** total overseas companies **with a branch**
- **3,277** total overseas companies **without a branch (therefore with a place of business)**

### **New accounts provisions (both Options 2 and 3) – assessment of admin saving**

26. In defining the new regime we have also given consideration to revised accounts provisions. Requirements in relation to filing of accounts by 'branches' are also governed by the 11th Company Law Directive. As far as overseas companies incorporated within the EEA are concerned, the 11th Directive requires the disclosure of the accounting documents of the company as drawn up, audited and disclosed pursuant to the law of the Member State by which the company is governed (known as "MS home state" rules). This is seen to be acceptable because those home state rules will follow the accounting directives (4th and 7th Company Law Directives) that apply to all Member States.

27. As far as companies incorporated outside the EEA are concerned, similar “home state” rules may apply. Where such rules are not equivalent to those in the accounting directives, the 11th Directive allows Member States to set their own requirements as to the accounts that are to be drawn up and filed.

28. Against this background, the current position in the 1985 Act is as follows. All ‘branches’ of overseas companies (that are limited companies) whose parent law requires the preparation, audit and disclosure of accounts (known as “home state accounts”) must file those accounts with Companies House. All ‘branches’ of overseas companies whose parent law does not require the disclosure of home state accounts are required to deliver accounts to Companies House that comply with section 700 of the 1985 Act (known as section 700 accounts). All ‘places of business’ simply file section 700 accounts.

29. The Company Law Review was critical of section 700 accounts, describing it as “difficult to work out the form and content of the accounts required”. The present section 700 requirements are based on requirements which used to apply specifically to banking, insurance and shipping companies (essentially based on the Companies Act 1948), which have since been superseded and bear little resemblance to the present accounting requirements for UK or other EC companies. The response to the CLR overwhelmingly agreed that these accounts provisions are complicated to apply and should be replaced by more straightforward requirements.

30. We have assessed a sample of accounts filed at Companies House by both ‘branches’ and ‘places of business’ of overseas companies incorporated in a variety of countries worldwide. Our assessment confirmed the confusion regarding what should be filed under section 700 of the 1985 Act and in some cases demonstrated that some overseas companies filed more than was necessary, with a self-imposed admin burden.

31. Based on the powers in the 2006 Act, we propose accounting provisions grounded in what is currently required of an overseas company by its home state, whether EU or non-EU, and regardless of how their UK business is defined. Where there are no such home state rules, we have proposed in draft Regulations more transparent accounting provisions based on 2006 Companies Act requirements with some modification.

32. To ensure the accounting procedure is transparent to creditors and the wider public, we have added a requirement that overseas companies, on filing home state accounts or Companies Act accounts, complete a short form to notify the Registrar of the following details: the legislative, accounting (generally accepted accounting principles, GAAP), auditing (generally accepted auditing standards, GAAS), and disclosure rules used in the preparation, auditing and filing of the accounts. This should not present anything more than a negligible additional admin burden to overseas companies and would ensure clarity about the information provided.

33. This accounts procedure would be applied to an overseas company that has an establishment in the UK, whether or not that included a ‘branch’. The issue here is not one of ‘branch’ versus ‘place of business’ and is instead associated with whether the country of incorporation of the overseas company requires preparation, audit and disclosure of accounts and what home state rules apply. We have aimed to create a system that allows as many companies as possible to file the accounts they are required to produce for their home state so that as few companies as possible fall into the default position. For those that do, we have aimed to be clear and straightforward in the provisions. As now, we have not imposed delivery requirements on unlimited companies.

34. In making these changes we believe that we have reduced an admin burden from overseas companies that have a 'place of business' in the UK and also overseas companies incorporated in a non-EEA country with a 'branch' in the UK in terms of them no longer having to interpret section 700 and prepare and file bespoke accounts. There will of course be an admin cost – but that will consist of filing accounting documents that have already been prepared and disclosing to the Registrar the basis of preparation and audit.

35. In order to keep the possible admin burden to a minimum, we have included within the regulations transitional provisions which allow overseas companies that have already registered a 'place of business' in the UK, but have not yet had to file a set of accounts, to meet the new UK Establishment registration requirement for a set of accounts at the point at which they next normally have to file a set of accounts, or by 1 October 2010, whichever is sooner. This allows such companies to avoid additional costs for translating sets of accounts twice in a financial year.

36. The main monetised benefit of the new regime is assessed on the basis that both non-EEC country companies with 'branches' and all overseas companies with 'places of business' will be free of the burden of having to prepare section 700 accounts. The aim of the new regime is to allow as many overseas companies as possible to provide the accounts of the company prepared under its parent law, where such law exists and where such law matches the requirements of the regime. There is a possibility that some of these companies will continue to have to prepare accounts, although the new requirements are easier to interpret than those set out in section 700 of the 1985 Act.

37. The PwC assessed cost for the preparation of section 700 accounts (MUID 29260) is £884.65 per company. The estimated total number of overseas companies that are either non-EU companies with a UK branch or overseas companies with a place of business in the UK is 7847 (based on Companies House data). Companies House do not hold records of the numbers of overseas companies that could have provided accounts under parent law and instead prepared section 700 accounts in the past – so it is difficult to assess an accurate picture of the actual saving. The estimated saving is therefore based on an indicative view that half of these companies affected will be in a position to provide parent law accounts and half will continue to produce bespoke section 700 accounts. There is still a saving linked to those companies preparing their own accounts as the provisions are more straightforward than section 700 accounts – this is based on an indicative halved cost of the PwC assessed figure. Therefore £5.21m is presented as an appropriate indicative saving  $\{(3923.5 \times £884.65) + (3923.5 \times £442.33) = £5.21m\}$ .

### **Credit and financial institutions**

38. Credit and financial institutions are treated separately to other overseas companies when filing accounts because the requirements, though very similar, implement the Bank Branches Directive. UK branches of these companies are subject to provisions set out in section 699A and Schedule 21C to the Companies Act 1985. These types of companies will continue to be treated separately under any new regime, which will only apply to branches of these overseas companies. In this respect, these companies are required to make a distinction in the definition of their presence in the UK, however this type of 'branch' is clearly defined in law (see s.1050 of the Companies Act 2006) – these tend to be UK branches of overseas banks etc.

39. As with current provisions, the draft Regulations propose to: make separate provision for institutions whose parent law requires preparation and audit of accounts from those parent law does not; and impose obligations on those institutions whose parent law does not require accounts, to prepare accounts in accordance with the Regulations (which requirements are the same as for companies as described in paragraphs 31 and 32 above).

### **Policy recommendation**

40. Given the responses to the CLR and the February 2007 consultation, and our burdens assessment outlined above, we reviewed again the original CLR proposal against Community law principles. Although the general principle of harmonisation means that we should not impose disclosure obligations that go beyond the 11th Directive in respect of 'branches', the Directive itself does not prevent the UK from imposing similar disclosure requirements in respect of 'places of business' and therefore from treating them equally under one regime. Instead, when imposing obligations we have to consider whether they could restrict the ability of overseas companies to establish in the UK and if so, whether those obligations can be justified.

41. To follow a single regime on the basis of 'branch' alone would definitely satisfy Community Law, however would exclude the registration of some overseas companies whose presence in the UK is defined as a 'place of business'. There is a risk here that enforcement agencies would then be undermined in their ability to carry out tax and fraud investigations and protect creditors. There is no associated increased admin burden beyond the Community Law requirements.

42. To follow a single regime on the basis of the wider concept of 'place of business' will catch most definitions of an overseas company's presence in the UK, requiring registration. This will satisfy those that currently need to access their details (i.e. creditors and enforcement agencies). There is a slight increased admin burden on those currently registered as 'places of business', giving a slightly reduced overall monetary benefit compared to the 'branch' only concept. On balance, however, this is minimal compared to the wider (non-monetised) benefit of a single and more straightforward regime.

43. The Government consulted on the draft regulations in December 2007. The vast majority of respondents to that consultation warmly welcomed the approach taken and strongly support the concept of a single regulatory regime for an overseas company with any kind of UK establishment. The Government confirmed its intention to proceed with this regime in July 2008 in response to that consultation.

**44. We have therefore proceeded to draft Regulations based on our preferred option of a single regime on the basis of the wider concept of 'place of business' (including a 'branch'), which we are calling 'UK Establishment', and which satisfies the requirements of the 11th Directive.**

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

<b>Type of testing undertaken</b>	<b><i>Results in Evidence Base?</i></b>	<b><i>Results annexed?</i></b>
Competition Assessment	No	No
Small Firms Impact Test	No	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	No
Rural Proofing	No	No

## Annexes

### Specific Impact Tests

**Small firms** – We have been guided by the 11th Company Law Directive in the treatment of all overseas companies, including small firms. Under these proposals, small overseas companies incorporated in EEA states will be compelled to comply with the company law of their home state when filing accounts with the Registrar, which may include exemptions similar to those in the 2006 Companies Act. Small firm exemptions (as apply to UK small companies) will apply to small overseas companies following our default overseas companies accounts provisions.

**Equality tests** – We do not believe that there will be an impact on the equality strands as the proposals impact on overseas companies and not on individuals.